BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
SHIRLEY MARK)

For Appellant: Robert R. Clamage
Public Accountant

For Respondent: Bruce W. Walker
Chief Counsel

Jacquiline W. Martins
Counsel

O P I N I O N

This appeal is made pursuant to section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Shirley Mark for refund of personal income tax in the amounts of $220.83, $208.83 and $457.98 for the years 1971, 1972 and 1973, respectively..

The sole issue presented in this appeal is whether appellant has met her burden of proving that respondent's deficiency assessments for the years in question were either partially or totally erroneous.

An audit by respondent for the period 1966 through 1971 resulted in upward adjustments to appellant's 1971 income. A proposed assessment in the amount of $318.00 for that year primarily resulted from respondent's adjustment reflecting additional income because of installment payments received by appellant in 1971 upon the sale of stock. Appellant had reported lesser income with respect to those payments. Appellant used the installment method of accounting in reporting the income.

Upon the death of her husband in 1967, appellant became sole owner of his former business. In 1968, she transferred assets of the business to a corporation in exchange for stock of that entity. As a consequence of that tax-free transaction, the stock acquired the same basis as the transferred business assets. It is this stock which appellant eventually sold in 1971. The proper original basis of those business assets in 1967 to appellant was their adjusted basis at the time of death with respect to appellant's one-half community property interest, and the fair market value at that time with respect to the other half-interest. Respondent then used an accelerated method of depreciation to calculate appellant's adjusted basis of the business assets at the time of their transfer for the stock in 1968.

Since the stock had the same basis to appellant as the property traded in exchange, it was this adjusted basis that was used by respondent in computing appellant's income from the installment payments received in 1971 upon sale of the stock.

Appellant had attributed a higher original basis in 1967 to the business assets when received, and had used the straight line method of depreciation (resulting in less depreciation than respondent's accelerated method) in determining the adjusted basis of the assets when exchanged for the stock. Therefore, the substituted basis she used for the stock was considerably higher, and, consequently, her reported income from the 1971 installment payments was considerably less than that determined by respondent.

Appellant's representative protested the proposed assessment for 1.97 1, urging that appellant's use of the straight line method of depreciation had been proper. Respondent ultimately agreed, and the tax assessment for 1971 was reduced to $220. 83.

As a consequence of a subsequent audit, respondent made several upward adjustments to appellant's reported income for the years 1972 and 1 973, and issued proposed assessments for those years. Appellant had also received installment payments from the 1.971 sale of the stock in 1972 and 1973 and reported less income from those payments than that determined by respondent because of the higher original 1967 basis appellant attributed to the business assets. Thus, a large portion of the assessments for those years also consisted of the unreported amount of income, as determined by respondent, from the installment payments.

Appellant duly protested the proposed assessments for 1972 and 1973. The assessments were affirmed, and the tax paid. Claims for refund were then filed for the years 1971 through 1973, denied, and this appeal followed.

The grounds of the appeal for the years 1971 through 1973 urged by appellant's representative are not clear. He asserts that respondent "depreciated the capital stock", a non-depreciable asset, and thereby wrongfully reduced the basis of the stock, resulting in an erroneous upward adjustment of the income derived from the installment payments. He seems also to claim that some amount of "depreciation" was erroneously calculated with respect to the business assets because, he alleges, it related to a period after the assets had actually been transferred by appellant in exchange for the stock, thereby causing a wrongful reduction of the appellant's basis of those business assets. Consequently, he claims that the stock acquired an erroneously low substituted basis, again ultimately causing an improper upward adjustment of income. He also asserts that respondent is endeavoring to make up for its own past auditing error of failing to timely assess additional tax liability for earlier years, for which assessments are now barred by the statute of limitations, by wrongfully increasing tax liability for the years at issue.

However, he has offered no proof that respondent has actually "depreciated stock", or has considered the business assets as subject to depreciation during a period when no longer owned by appellant. Nor has he offered any other proof indicating that the assessments in question are either partially or totally erroneous.

It is well settled that respondent's determinations are presumed correct, and that the burden is on the taxpayer to prove that they are erroneous; mere unsupported statements do not overcome the presumption. (Appeal of Clyde L. and Josephine Chadwick, Cal. St. Bd. of Equal., Feb. 15, 1972; Todd v. McColgan, 89 Cal. App. 2d 509 [201 P. 2d 414] (1949); Hoefle v. Commissioner, 114 F. 2d 713 (6th Cir. 1940).) Consequently, we must sustain respondent's action.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Shirley Mark, for refund of personal income tax in the amounts of $220.83, $208.83 and $457.98 for the years 1971, 1972 and 1973, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 16th day of August, 1979, by the State Board of Equalization.

William M. Bennett, Chairman

Richard Nevins, Member

Geo. R. Reilly, Member

____________________, Member

____________________, Member